

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 21, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP2523**

**Cir. Ct. No. 2015CV4524**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**CITY OF MILWAUKEE,**

**PETITIONER-RESPONDENT,**

**V.**

**LIST OF TAX LIENS FOR 2015 #3,**

**RESPONDENT,**

**KAREN HAYES,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. Affirmed.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Karen Hayes, *pro se*, appeals a judgment of foreclosure entered in favor of the City of Milwaukee, which commenced the

action to foreclose on property tax liens pursuant to WIS. STAT. § 75.521 (2015-16).<sup>1</sup> The circuit court rejected Hayes's defense that she and the City had renegotiated an earlier agreement for her payment of the delinquent taxes. We affirm.

## **BACKGROUND**

¶2 Hayes entered into an agreement with the City to make payments in satisfaction of property taxes levied on a property she owned. When Hayes failed to fulfill her obligations under the agreement, the City filed a petition alleging failure to pay property taxes and seeking to foreclose on Hayes's property.

¶3 In response to the foreclosure petition, Hayes appeared in circuit court and alleged that she and the City had entered into a second agreement under which she was allowed to resume making tax payments in an amount less than originally agreed. The circuit court adjourned the matter to allow the City time to investigate Hayes's allegations and to permit the parties an opportunity to produce evidence regarding the existence of a modified payment plan.

¶4 At the next hearing, the circuit court received evidence from the City that it had not renegotiated Hayes's payment plan. An assistant city attorney filed a document stating:

First, I never told Ms. Hayes that the [C]ity accepted a lower payment amount. When she inquired about getting on a payment plan of less than \$265 per month, I told Ms. Hayes that I have no problem if our collection firm approves of such a lower payment. Second, I did not request on behalf of the [C]ity that Ms. Hayes go on a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

payment plan at a lower rate; I passed her request on to the collection firm.

An attorney with the firm retained by the City to collect delinquent taxes filed an affidavit explaining that he rejected Hayes's proposal to renegotiate.

¶5 In response to the City's submissions, Hayes insisted that she and the City had negotiated a new payment agreement. The circuit court asked her if she had written documentation supporting her claim. She responded: "if I did, I don't have it with me now." The circuit court found that no new agreement existed and ordered a judgment of foreclosure. Hayes appeals.<sup>2</sup>

## DISCUSSION

¶6 WISCONSIN STAT. § 75.521 allows a foreclosure action on property when the owner fails to pay property taxes.<sup>3</sup> Under the statute, the owner may contest foreclosure for only three reasons: (1) the land is not subject to taxation; (2) the tax was in fact paid; or (3) the tax lien is barred by the statute of limitations. *See* § 75.521(7). Hayes raised a different defense, namely, equitable estoppel. The City concedes that a property owner may rely on a theory that equitable estoppel bars a taxing authority from foreclosing on a tax lien. We are

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<sup>2</sup> Hayes moved to reconsider the foreclosure judgment underlying this appeal. The circuit court denied reconsideration in an oral ruling that was never reduced to writing. We do not have jurisdiction over the oral denial of Hayes's reconsideration motion. *See Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶1 n.2, 354 Wis. 2d 603, 849 N.W.2d 920 (holding that this court lacks jurisdiction over an oral order denying reconsideration that is pronounced after entry of a final written judgment), *rev'd on other grounds*, 2015 WI 27, 361 Wis. 2d 359, 860 N.W.2d 267. Accordingly, we do not discuss the reconsideration proceedings any further.

<sup>3</sup> WISCONSIN STAT. § 75.521 establishes a county's right to bring a foreclosure action. In the petition underlying this action, the City alleged and showed that it has an intergovernmental cooperation agreement with Milwaukee County permitting the City to proceed under § 75.521. Hayes does not dispute the City's authority to foreclose under § 75.521.

not required to accept a concession of law. *See State v. Carter*, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516. In the absence of a dispute between the parties, however, we elect to accept the concession in this case. *Cf. DOR v. Family Hosp. Inc.*, 105 Wis. 2d 250, 254, 313 N.W.2d 828 (1982) (concluding that equitable estoppel may be invoked against a taxing authority).

¶7 Equitable estoppel has four elements: “(1) action or nonaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, (4) which is to the relying party’s detriment.” *State v. Drown*, 2011 WI App 53, ¶7, 332 Wis. 2d 765, 797 N.W.2d 919. When estoppel is asserted against the government, the party invoking the doctrine bears a heavy burden: “[t]he evidence must be so clear and distinct that a contrary result would amount to a fraud.” *Cohn v. Town of Randall*, 2001 WI App 176, ¶19, 247 Wis. 2d 118, 633 N.W.2d 674.

¶8 Here, Hayes alleged that foreclosure would be inequitable because, although she did not satisfy her obligations to pay delinquent taxes pursuant to her payment plan, an assistant city attorney had agreed to renegotiate the plan. The circuit court found that no such renegotiation agreement existed.

¶9 We apply a highly deferential standard of review to a circuit court’s factual findings. *See Royster-Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. We uphold such findings unless they are clearly erroneous, *see id.*, and they are not clearly erroneous if they are supported by any credible evidence in the record or any reasonable inferences from that evidence, *see Insurance Co. of North America v. DEC International, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). Additionally, a circuit court

acting as fact-finder is the “ultimate arbiter of the credibility of the witnesses.” *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

¶10 The record supports the circuit court’s finding that Hayes and the City did not agree to renegotiate a payment plan for her delinquent property taxes. Hayes claimed that renegotiations took place, but the circuit court was not required to accept her assertion. *See id.* Hayes failed to produce any documents showing that a new agreement existed. The City presented evidence refuting her claim and affirmatively showing that the parties did not renegotiate. The circuit court’s finding is thus not clearly erroneous, and, accordingly, we must defer to it. *See Royster-Clark, Inc.*, 290 Wis. 2d 264, ¶11.

¶11 Given the circuit court’s finding that Hayes and the City did not renegotiate her payment plan, Hayes failed to meet her burden to produce “clear and distinct” evidence supporting an equitable defense to foreclosure. *See Cohn*, 247 Wis. 2d 118, ¶19. The circuit court therefore properly rejected her effort to equitably estop the City from foreclosing on her property. *See id.*

¶12 Hayes nonetheless argues she is entitled to relief. She believes that the assistant city attorney with whom she attempted to renegotiate her payment plan sent a document of some kind to the City’s collection lawyers, and this document “may have proven [her] ongoing negotiations.” In her view, the circuit court erred by entering a judgment of foreclosure “despite being aware of possible evidence of contents of email[s] or documentation [from the assistant city attorney to the collections attorney].” Hayes is wrong. She, not the circuit court, had the

obligation to produce evidence satisfying her burden of proof. She failed to do so.<sup>4</sup>

¶13 Because on appeal Hayes continues to insist that additional evidence in her favor may exist, we, like the City, construe her appellate briefs as including a request for discretionary reversal on the ground that the real controversy was not fully tried. *See State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 164, 582 N.W.2d 131 (Ct. App. 1998) (noting our obligation to give a liberal construction to a *pro se* litigant’s submissions). We reject the request, as construed.

¶14 Pursuant to WIS. STAT. § 752.35, we may order a new trial in the interest of justice if it appears from the record that the real controversy has not been fully tried. *See Hunzinger Constr. Co. v. Granite Res. Corp.*, 196 Wis. 2d 327, 340-41, 538 N.W.2d 804 (Ct. App. 1995). “[R]eversals under [ ] § 752.35 are rare and reserved for exceptional cases.” *State v. Kucharski*, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697.

¶15 Hayes fails to show that the real controversy was not fully tried. As the City correctly explains, the real controversy in this case was whether the City should be equitably estopped from foreclosing on Hayes’s property based on an

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<sup>4</sup> Hayes suggests she was unable to prove that she renegotiated her payment plan because the City did not comply with a circuit court order directing the City to provide her with correspondence between an assistant city attorney and the City’s collection lawyers. We have carefully examined the record, and we agree with the City that Hayes misstates what took place. The record—specifically including the portion to which Hayes directs our attention—shows that when Hayes began discussing documents she wanted the circuit court to examine, the circuit court responded: “I don’t want to hear about it until you show it to counsel. That’s how it works.” When Hayes continued to argue, the circuit court again directed Hayes to show her paperwork to the City’s attorney, explaining that the attorney “has a right to see the stuff that you’re referring to evidentially, ma’am. Give it to her.” In short, contrary to Hayes’s claim, the circuit court did not order the City to disclose documents to her; rather, the record shows that the circuit court ordered Hayes to provide documents to the City.

alleged agreement to renegotiate her tax payments. Hayes did not produce evidence supporting her equitable defense, and the City offered documentation refuting her contentions. The circuit court expressly considered whether an additional document nonetheless might exist that would support her defense, and the circuit court found that there was no such document. The circuit court therefore entered a judgment of foreclosure. The record thus demonstrates that the real controversy was thoroughly explored in circuit court, and we are satisfied that no exceptional circumstances warrant the extraordinary step of granting a discretionary reversal. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

